
U.S. Department of Labor
Office of Administrative Law Judges
525 Vine Street, Suite 900
Cincinnati, OH 45202

Date: Nov. 5, l997

Case No.: 96-ERA-30

In the Matter of

ROBERT PHILLIPS,
Complainant,

v.

STANLEY SMITH SECURITY, INC.,
Respondent.

APPEARANCES:

John T. Burhans, Esq.
St. Joseph, Michigan
For the Complainant

Kevin M. McCarthy, Esq.
Kalamazoo, Michigan
For the Respondent

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises out of a complaint of discrimination filed pursuant to Section 211 of the Energy Reorganization Act of 1974, as amended, 42 U.S.C. Section 5851, *et seq.*, (hereinafter ERA). (Admin. Ex. 1)[1] The implementing regulations are found at 29 C.F.R. Part 24. The ERA affords protection from employment discrimination to employees in the nuclear industry who commence, testify at, or participate in proceedings or other actions to carry out the purposes of the ERA or the Atomic Energy Act of 1954,

as amended, 42 U.S.C. Section 2011, *et seq.* The law is designed to protect "whistleblower" employees from retaliatory or discriminatory actions by an employer.

A formal hearing in this case was held in Benton Harbor, Michigan, from October 22, 1996 to October 23, 1996. The Complainant alleged in his original complaint that he

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was terminated from his employment with the Respondent because he had filed, or someone at his direction had filed, a safety complaint with the Nuclear Regulatory Commission. (Adm. Ex. 1, at paras. 13 and 15) However, at the hearing this allegation was withdrawn by the Complainant. (Tr. 195-196) Since the record contains no evidence that the Complainant, or someone at his direction, ever reported a safety concern to the Nuclear Regulatory Commission, or any other governmental body, that allegation is dismissed. At the hearing the Complainant also asserted that the only protected activity upon which he was relying involved internal safety complaints to management. (Tr. 195-196) However, in his post-hearing brief, the Complainant also argued that his activities concerning his contacts with a local television station also constituted protected activity. Because of the equivocal nature of the Complainant's assertions, I will consider the alternative proofs offered by the Complainant to support the merits of his Complaint.

Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the regulations issued thereunder. The findings and conclusions which follow are based upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent case law.

ISSUES:

1. Whether the Complainant's contact with a local television station concerning the disarming of plant guards constituted protected activity;
2. Whether the Complainant made internal safety complaints to management which constituted protected activity;
3. Whether the Respondent knew of the protected activity when it took adverse employment action against the Complainant; and,
4. Whether the Respondent's decision to terminate the Complainant was motivated because he engaged in protected activities.

FINDINGS OF FACT:

Respondent, Stanley Smith Security, Inc., is a private company engaged in providing security services to various industries throughout the country. One of their contracts is with Indiana & Michigan Power Company (INM) to provide security services at the D.C. Cook Nuclear Power Plant in Bridgman, Michigan. Complainant, who worked for the Respondent from December of 1991 to his termination in May of 1995, was employed at this plant as an armed security guard. (Tr. 131)

From the time the Complainant began work at this plant until his termination,

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the plant was protected by approximately ninety armed guards who worked in three shifts around the clock. At the request of INM, Respondent was asked to restructure its security force to concentrate on maximizing protection of the internal operations of the plant and to scale down the security that patrolled the perimeter. This plan was authorized by, and designed in conjunction with, the Nuclear Regulatory Commission. (Tr. 297, 347-48) In fact, the record reflects that the restructuring plan was initiated by the Nuclear Regulatory Commission as the result of an audit. (Tr. 352) News of the restructuring had been shared with the security guard staff well in advance of its implementation. (See Resp. Exs. 9 and 10) Moreover, the Complainant concedes that, "[t]he company informed the licensee, the NRC, virtually all plant personnel, all levels of the United Plant Guard Workers of America (not just those at the plant), and the public at large through the public relations office for the licensee." (Complainant's Post-hearing brief at pp. 2-3) Thus, it appears from this record, and I find, that the plan to reduce the number of armed guards at the INM plant was well known among plant personnel. It further appears from the record, and I find, that it was common knowledge that the restructuring plan had been approved by the Nuclear Regulatory Commission prior to its implementation.

On April 7, 1995, Respondent held a meeting in which all security personnel were notified of the restructuring plan that was being implemented at the site. Al Hemerling, the site manager for Respondent, conducted the meeting. Also present were Lowell Wilds (Director of Nuclear Security for Stanley Smith), Randy Dorn (Stanley Smith Vice-President for the region) and Walt Hodge (Superintendent for Security for INM). (Tr. 140) The plan was to decrease the number of armed guards, but also to create a new class of security guard. The new position, a Tactical Response Officer (TRO), was going to be a highly-trained officer who would be stationed in the internal area of the plant responsible for securing the plant's core areas. Officers patrolling the perimeter and other areas outside of the core internal area, would no longer be armed. Instead, they would carry mace and a two-way radio. The qualifications needed to apply for this position were discussed as well as the repercussions for those individuals who were armed guards at the present time who would not qualify for the new position. It was the contention of the representatives from the Respondent, as well as from INM, that security would be enhanced as a result of this plan. Mr. Hemerling testified that he orally warned the officers that the restructuring plan was not information that could be disclosed to the public. (Tr. 251)

The introduction of this plan was met with both support and opposition. Complainant alleges that he was "vociferous" in his opposition to this plan at the meeting and on subsequent occasions. (Complainant's Post-hearing brief at p. 5) At the April 7, 1995, meeting, Complainant testified that he voiced his opposition to the plan during the question and answer session held subsequent to the presentation of the restructuring plan.

(Tr. 141) The Complainant further testified that Mr. Hemerling did not respond to his concerns. (Tr. 145)

The Complainant also testified to a conversation he had with Lieutenant McKamy concerning the restructuring plan. (Tr. 144) According to the Complainant, he expressed concern to Lieutenant McKamy over the company's proposed plan to drop the first line of defense.

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(Tr. 144) When the Complainant stated that he wanted to discuss the plan with representatives from INM, Lieutenant McKamy allegedly replied "No, you're not" in a tone that the Complainant took as an order. (Tr. 144) In addition to Lieutenant McKamy, the Complainant also testified to discussing his concerns with several other lieutenants and captains after the meeting and for weeks subsequent, although none of the other persons with whom the Complainant allegedly spoke were identified. (Tr. 143, 145, 155)

Mr. Hemerling and Mr. Wilds both testified at the hearing that they heard no objections to the plan by the Complainant. (Tr. 252, 386) Both men also testified that no one indicated to them that the Complainant, or any other officer, had registered any complaints regarding the restructuring plan. (Tr. 253, 386) Rather, Mr. Hemerling and Mr. Wilds both testified that the Complainant had voiced a concern at the meeting regarding the attendance points needed to qualify for the position of Tactical Response Officer. (Tr. 252, 376) According to Mr. Hemerling, the Complainant did not qualify for this new position due to the number of attendance points he had accumulated. (Tr. 249) Mr. Wilds stated that the Complainant was in favor of the plan up until the time he discovered he did not qualify for the new position. (Tr. 376)

On the evening of April 20, the Complainant was contacted by Luke Choate, an anchorman for a local television station, Channel 22. (Tr. 156) Mr. Choate, who is married to the Complainant's cousin, called him at his residence. Mr. Choate, knowing that the Complainant worked at the nuclear power plant, called to confirm information about the plant that the station had supposedly already acquired. (*Id.*) Mr. Choate asked the Complainant if it was true that security at the plant was going to be disarmed. (*Id.*) The Complainant confirmed this information. (*Id.*) However, the Complainant declined Mr. Choate's invitation to appear on-camera to discuss the proposed reduction in armed guards for fear of jeopardizing his job. (Tr. 156-7) This fear was grounded in the documents he signed regarding the disclosure of information. (Tr. 157) The Complainant referred Mr. Choate to Greg Peck, the union president, for further information. (Tr. 157)

Mr. Peck was contacted on the evening of April 24 by Steve Barron, a reporter for Channel 22, and asked to set-up an interview concerning the restructuring plan at the plant. (Resp. Ex. 15) Mr. Peck met with the reporter and was interviewed for a clip that was shown on the 11:00 p.m. news that night. (Comp. Ex. 11) Mr. Peck testified that he merely confirmed information that the reporter already had and was careful not to

disclose anything that the media did not already have. (Resp. Ex. 15) According to Mr. Peck, the reporter already had manning numbers as well as the details of the proposed restructuring plan. (Tr. 81; Resp. Ex. 15) In fact, the reporter admitted that no one that he had interviewed had told him something that he did not already know. (Comp. Ex. 11) Therefore, Mr. Peck's interview consisted of him confirming a 65 percent reduction in armed security as well as his concerns that this move would adversely affect the security of the plant. (Resp. Ex. 15)

In addition to the interview with Mr. Peck, the story highlighted a copy of an

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e-mail that had been obtained from the nuclear power plant. (Comp. Ex. 11) This e-mail, from Walt Hodge to Alan Blind (Site Vice-President for INM), concerned a warning the plant had received from the FBI regarding threats made by terrorist groups directed at nuclear facilities in the United States. (Comp. Ex. 25) This e-mail had been posted in the break room utilized by the guards at the plant.

News of the television report spread quickly through the plant on the morning of April 25. Mr. Peck was suspended pending an investigation for suspicion of disclosing security related information to unauthorized personnel. At the time Mr. Peck was suspended, Teresa Greer came forward with information linking the Complainant to the disclosure of information to the media. Ms. Greer, an armed guard like the Complainant, alleged that the Complainant told her of his involvement with the media while the two were smoking on April 25. According to Ms. Greer, the Complainant stated that he had called the station and spoken to a man named Steve concerning the restructuring plan and the downsizing. (Resp. Ex. 12; Tr. 439) In addition, Ms. Greer alleged that the Complainant admitted that he had copied the e-mail from the break room and had faxed it to the station. (Tr. 439) Further, Ms. Greer asserted that Complainant also admitted to calling the station to see if the fax had arrived and also supplied the station with the names of Al Hemerling and Greg Peck for further comment. (Tr. 439) The Complainant denied that any such discussion ever took place. (Tr. 478) However, Ms. Greer's testimony was buttressed by that of Linda Bennett. She stated that the Complainant, prior to the incident with the media, asked her if he could use an e-mail for his own personal use. (Tr. 421; Resp. Ex. 25) She replied that she did not see a problem if he sought permission first. (*Id.*) The only e-mails she knew of were two in the break room, one of which was the e-mail used by Channel 22. (Tr. 428) This information was not shared with the Respondent until after the decision to terminate the Complainant had been made. (Tr. 424) The Complainant also denied that this conversation took place. (Tr. 482)

The Complainant, through the testimony of fellow guards, established that the break room was not a totally secure area. (Tr. 103, 123) Visitors and contractors had access to this room where this e-mail was located. (*Id.*) Additionally, testimony was adduced from other guards to the effect that the e-mail did not comprise safeguards information, and thus could be released. (Tr. 48, 103, 114, 124) It should be noted that the contractual

provisions regarding disclosure of information by employees of the Respondent did not speak in terms of safeguards, but in terms of security related information. (Resp. Exs. 2-9)

In light of Ms. Greer's information, the Complainant was questioned regarding his knowledge of the incident by Mr. Hemerling on the afternoon of April 25. The Complainant had brought in a videotape of the newscast from the night before and had allowed the Respondent to make several copies. (Tr. 256) In the process of getting the tape back, Mr. Hemerling asked the Complainant of his involvement. (Tr. 256) The Complainant acknowledged speaking with Luke Choate. (Tr. 256) Mr. Hemerling requested a written statement from the Complainant the next day concerning his involvement in this incident. (Tr. 256)

On the morning of April 26, Al White, assistant site manager, met with the

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Complainant for a brief time whereupon the Complainant requested union representation. The meeting was delayed until a union representative arrived. Jim York, the union steward, had a brief meeting with the Complainant upon his arrival. Following this discussion, Mr. Hemerling questioned the Complainant concerning his role in the release of information to the media. During the course of this meeting, the Complainant, for reasons not explained in the record, initially denied having had a discussion with Mr. Hemerling the day before, but later conceded that he had. (Tr. 270) The Complainant also refused to submit a written statement but finally complied at the completion of the meeting. The Complainant, in his statement, acknowledged only the conversation with Luke Choate. (Resp. Ex. 13) The Complainant was then suspended pending an investigation of his involvement in this incident. (Resp. Ex. 14) Following the meeting, Mr. Hemerling received the written statement from Ms. Greer concerning her allegations of the Complainant's involvement in this matter. (Resp. Ex. 12)

On April 27, a meeting was held in which the Complainant, Mr. Hemerling, Mr. Wilds and Gary Anderson (international union representative) were present. (Tr. 271) At the meeting, the Complainant refused to sign a consent form regarding his cooperation in the investigation. (Tr. 271; Resp. Ex. 17) Mr. Wilds asked the Complainant if he had any additional information to add to his statement, but the Complainant offered nothing. (Tr. 161)

On May 3, at a meeting with Mr. Hemerling, Mr. White and the Complainant, the Complainant was notified of his termination. (Tr. 274; Resp. Ex. 20) Mr. Wilds had recommended termination to his superiors and Mr. Hemerling concurred in the recommendation. (Tr. 276) Mr. Hemerling supported the decision because their investigation indicated that the Complainant had violated company policies by releasing information gained while in the employment of the Respondent to unauthorized personnel. (Tr. 276) Based on the information they had received, they felt that the

Complainant had initiated contact with Channel 22 and had also faxed them the e-mail from the break room. (Resp. Ex. 19) As an aggravating factor, they felt that the Complainant had been less than forthright in his actions during the investigation. (*Id.*)

In addition to the recommendation of termination of the Complainant, Mr. Wilds and Mr. Hemerling also recommended that Mr. Peck be suspended for ten days for his involvement in this incident. (Resp. Exs. 19, 21) Mr. Peck was treated differently due to the fact that he spoke to the media as union president and with the consent of the international union president. (Tr. 278) Additionally, Mr. Wilds felt that Mr. Peck, unlike Mr. Phillips, had been forthright and cooperative. (Tr. 387) This suspension, after negotiations with the union, was reduced to five days.

Both the Complainant and Mr. Peck, according to the Respondent, were disciplined for violating company policies on the disclosure of security related information obtained from their employment. The Respondent produced extensive documentation regarding its policy on disclosure of security-related information to unauthorized persons.

All employees of the Respondent, including the Complainant, were required

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at the time of hiring to sign a document entitled "Conditions of Employment." (Resp. Ex. 2; Comp. Ex. 4) Item 10 of this document states, "I will safeguard company and client security-related information and ensure this information is not communicated to unauthorized personnel." (*Id.*) In a document entitled "Ethics and Standards," employees are notified that failure to abide with company, client, state or federal rules/laws is cause for discipline up to and including termination. (Resp. Exs. 3, 5) A document entitled "Applicant/Employee Acknowledgments," included the following:

> Any person who is . . . an employee of such licensee, shall not divulge to any person other than their employer, except as their employer shall direct and except as may be required by law, any information acquired by them during such employment, with respect to any of the work to which they or any other employee of such licensee shall have been assigned by such licensee or with respect to any of the work, business or affairs of such licensee.

(Resp. Ex. 4; Comp. Ex. 5) The Respondent also required its employees to sign a non-disclosure statement which read:

> I understand and hereby acknowledge that information relating to the security of any Indiana Michigan Power Company facility is restricted in nature, and shall not be divulged to unauthorized individuals. I recognize my responsibility in maintaining the confidentiality of this information and shall not release such information unless authorized by Indiana Michigan Power Company. I am aware of the potential civil and criminal penalties imposed for my unauthorized disclosure of restricted information.

(Resp. Exs. 6, 8) All of these forms were read and acknowledged as understood by the Complainant. According to the Respondent, it was the violation of these policies, as well as Michigan law regarding the obligations of security guards, that prompted the disciplinary action taken.

Pending Motions:

A. Motion to Strike Portions of Complainant's Brief:

Respondent moved to strike any reference to 10 C.F.R. §73.46 from the Complainant's brief on the ground that this provision is inapplicable to the D.C. Cook Nuclear Power Plant. The Complainant, in response, argued that the Respondent was aware of the Complainant's reliance on this provision throughout the proceedings and did not object. (Complainant's Answer To Respondent's Motion To Strike Portions Of Complainant's Brief, pp. 1-2) Additionally, Complainant argued that 10 C.F.R. Part 73, and all the provisions contained therein, does in fact apply to this plant. (*Id.* at 2-3) Further, Complainant asserted that even if the Respondent

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is accurate, the employee is under no obligation to prove that each allegation is true, only that it was brought in good faith. (*Id.* at 3)

I have considered the Respondent's motion to strike portions of the Complainant's brief and the Complainant's response thereto. I find that the Complainant's references to 10 C.F.R. Part 73 are not particularly relevant to the underlying issue of whether the Complainant was terminated for unlawful reasons. Although the Complainant attempted to portray a reliance upon 10 C.F.R. Part 73 for his alleged safety concerns about the restructuring of the security force, it was readily apparent to me that the Complainant had no knowledge of the existence of 10 C.F.R. Part 73, much less its provisions, at the time he expressed his concerns. This was after acquired information by the Complainant used by him in a Procrustean attempt to legitimize his perceived safety concerns. However, in light of my ultimate findings in this case, it is unnecessary to strike the references thereto in the Complainant's post-hearing brief since there is no prejudice to the Respondent.

B. The admissibility of a state administrative determination concerning the absence of wrongdoing by the Complainant:

At the hearing, the Complainant moved to have the findings of the Michigan Security Commission concerning his termination admitted into the record. (Comp. Ex. 18) The exhibit was conditionally received at the hearing with final admission held in abeyance until the parties briefed the issue.

Counsel for the Respondent asserts that such evidence is inadmissible by statute in Michigan. (Respondent's Post-Hearing Brief, pp.26-7) Indeed, MCLA 421.11(b)(1)(iii) specifically precludes such determinations from being used in any tribunal unless the Commission is a party. Counsel for Complainant asserts that Michigan law, in this regard, is preempted by Federal Whistleblower statutes. (Complainant's Brief, p.23)

I agree with the Complainant that a state statute may, under certain circumstances, be pre-empted by federal law. However, I find that in this instance there is no need to decide the issue of whether the doctrine of preemption is applicable in this case. Although such findings may have peripheral relevance in determining the motives of an employer in the termination of an employee, such findings are not determinative in collateral proceedings. In this case, the findings of the Michigan Unemployment Commission consist solely of a determination that the Complainant did not engage in conduct which disqualified him from receiving unemployment compensation benefits. (Comp. Ex. 18) There is no discussion of the facts, the standards applied in reaching its determination or the issues considered. Given the lack of any probative value in this document, I find that it is of no relevance to the instant proceeding. Therefore, I do not consider it in reaching my decision in this matter.

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CONCLUSIONS OF LAW:

This case was brought pursuant to the employee protection provision of the Energy Reorganization Act. The Act specifically provides protection to an employee who:

> (A) notified his employer of an alleged violation of this chapter . . . ;
> (B) refused to engage in any practice made unlawful by this chapter . . . if the employee has identified the alleged illegality of the employer;
> (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter . . . ;
> (D) commenced, caused to be commenced, or is about to commence or caused to be commenced, a proceeding under this chapter . . . or a proceeding for the administration or enforcement of any requirement imposed under this chapter;
> (E) testified or is about to testify in any such proceeding; or
> (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purpose of this chapter . . .

42 U.S.C. §5851(a)(1)(A)-(F).

In order to prevail in a whistleblower protection case based upon circumstantial evidence of retaliatory intent, the complainant must prove that: the complainant was an employee of a covered employer; the complainant engaged in protected activity; the complainant thereafter was subjected to adverse action regarding his or her employment; and the respondent knew of the protected activity when it took the adverse action. *See Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.*, 91-ERA-46, slip op. at 11 n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom.*, *Carroll v. United States Dept. of Labor*, 78 F.3d 352, 356 (8th Cir. 1996). Complainant must also present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Id.* If a complainant succeeds in establishing the foregoing, the respondent must produce evidence of a legitimate, nondiscriminatory reason for the

adverse action taken. *Dartey v. Zack Co. of Chicago*, 82-ERA-2, slip op. at 8 (Sec'y Apr. 25, 1983). If the respondent successfully produces such evidence, the complainant bears the burden of establishing, by a preponderance of the evidence, that the adverse action was in retaliation for the protected activity. Pursuant to Section 211(b)(3) of the ERA, however, if the complainant has established that protected activity contributed to the adverse action, the respondent must demonstrate, by clear and convincing evidence, that the adverse action would have taken place in the absence of the protected activity. *See Johnson v. Bechtel Construction Co.*, 95-ERA-11 (Sec'y Sept. 28, 1995).

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There is no dispute in this claim that the Complainant was an employee of an employer covered by the Act. Additionally, it is not contested that the Complainant was subjected to adverse action as he was terminated. The remainder of the *prima facie* elements, however, are disputed and will be addressed below.

Protected Activity:

In order for the Complainant to recover, he must show that he was engaged in protected activity. The Complainant contends that he was terminated because he informed the media of his safety concerns and, alternatively, because of the internal complaints he voiced regarding the implementation of the restructuring plan. (Tr. 195)

Whether Complainant's contact with the news media constituted protected activity?:

The Complainant avers that his contact with the news media, as related above, constituted protected activity. The Respondent, on the other hand, contends that the Complainant's contact with the news media was an unauthorized release of security information in violation of company rules as well as state law.

At the outset of this discussion, let me state that I found the Complainant to be a less than credible witness whose testimony was often contradictory and evasive. Moreover, the Complainant impressed me as a person with a personal agenda who was more concerned about protecting his own position as an armed security guard than protecting the public because of his perceived safety concerns. In particular, I do not credit the Complainant's denials concerning the transmission of the e-mail message to the news media or that he had no contact with news reporter Steve Barron prior to his discharge. His testimony is directly contradicted by the testimony of Ms. Greer and Ms. Bennett, both of whom struck me as candid and forthright witnesses. The fact that Steve Barron was contacted by someone in the employ of the respondent and the fact that the television station had a copy of the e-mail that had been posted on the plant bulletin board is not disputed. Yet, there is nothing in the record that suggests that the information was furnished by some alternative source. In short, based on the evidence before me, the finger of suspicion points only to the Complainant.

There is no doubt in my mind that the Complainant was upset by the fact that he was going to be disarmed and that due to the fact that he had acquired too many absentee points he would not be eligible to be considered for the TRO position, with its higher rate of pay. Therefore, I find that he was motivated, not by safety considerations, but rather by attempting to embarrass his employer and the licensee by creating a media event which would possibly result in reconsideration of the implementation of the newly proposed security plan. The Complainant's motive aside, however, the Secretary has held that where a complainant has a reasonable belief that a respondent is violating the law, other motives he may have for engaging in protected activity are

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irrelevant. *Diaz-Robainas v. Florida Power and Light Company*, 92-ERA-10, slip op. at 8 (Sec'y Jan. 19, 1996). Thus, irrespective of the purity of the Complainant's motives, the test is whether he had a reasonable belief that the Respondent was in violation of law.

As noted above, there is no question that the issue of guard restructuring was a well known fact at the plant and among the security force. There is nothing in this record to suggest that the Complainant was unaware of the plan well in advance of its announced implementation. Further, the record is clear that the plan had not only been initiated by the Nuclear Regulatory Commission, but had been approved by it prior to the announced implementation. (Tr. 297, 347) Again, there is nothing in this record to suggest that the Complainant was unaware of the Nuclear Regulatory Commission involvement in the restructuring. That being so, where can it be argued that the Complainant had a reasonable belief that the Respondent was either engaged in some violation of the law or was about to engage in some violation of the law? The answer, of course, is that under the circumstances here presented the Complainant could not have held such a belief. That being so, I find that the Complainant's contact with the news media, under the peculiar facts of this case, did not amount to a protected activity.

In so holding, I am mindful that the whistleblower provisions of the statute must be liberally construed so as to protect those persons having legitimate safety concerns. The reporting of unlawful activity must be encouraged and those who report it are entitled to be protected. But, in the instant case, the Respondent was not engaged in any unlawful activity with respect to the security restructuring plan. Gainsaid, the activity of the Complainant in contacting the news media was not protected by the Act. Accordingly, I find that the respondent did not violate the Act by terminating the Complaint's employment.

Whether the Complainant's internal complaints amounted to protected activity?:

Although not stated in the Act, it is now generally held that internal complaints by an employee to his/her employer can constitute protected activity. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984); *Kansas Gas & Electric Co. v.*

Brock, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Bassett v. Niagra Mohawk Power Corp.*, 85-ERA-34 (Sec'y Sept 28, 1993).

The Complainant has alleged that he registered a number of verbal complaints with various personnel from the Respondent. According to the Complainant, he first complained of the restructuring plan at the meeting on April 7 held to inform security personnel of the plan. (Tr. 139) This assertion was countered by the testimony of Mr. Hemerling and Mr. Wilds who denied hearing any complaint regarding the safety of the plan from the Complainant. (Tr. 252, 386)

The Complainant further alleged that he expressed his concerns about the restructuring plan to Lieutenant McKamy. (Tr. 144) This assertion is uncontradicted as there was no evidence in the record to indicate that this conversation did not take place.[2] Finally, the Complainant alleged that he voiced

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his safety concerns with several other captains and lieutenants of the Respondent without specifying the identity of these officers. (Tr. 145, 155) Again, this testimony is uncontradicted. As a result, I find that the Complainant voiced safety concerns in regards to the restructuring plan with employees of the Respondent.

Despite the informal nature of these complaints, precedent establishes that such complaints can still be considered protected activity. In *Samodurov v. General Physics Corp.*, 89-ERA-20 (Sec'y Nov. 16, 1993), the Secretary held that an informal safety complaint to a supervisor is sufficient to establish the protected activity. Additionally, the Secretary held that corroborating testimony of such complaints is not necessary as the testimony of the complainant may be sufficient. *Id.* As a result, I find that the Complainant has established that he was engaged in protected activities by voicing his concerns with his supervisors.

The fact that the Complainant engaged in activities that could be deemed protected does not, however, end the analysis. In order for such activities to be actionable, the Complainant must also have registered a complaint that indicates a violation of the controlling Act. Complainants need not state the precise violation nor need they prove that their allegations are factually true. The Acts protect employees for making safety and health complaints "grounded in conditions constituting reasonably perceived violations of the environmental acts." *Johnson v. Old Dominion Security*, Case Nos. 86-CAA-3, 4, and 5, (Sec'y May 29, 1991), slip op. at 15. However, the Acts do not protect an employee simply because he subjectively thinks the complained of employer conduct might affect the environment. *Crosby v. Hughes Aircraft Co.*, 85-TSC-2 (Sec'y Aug. 17, 1993), slip op. at 26. The Secretary, also in *Crosby*, held that internal complaints about a technical issue which could only threaten the environment if many speculative events all occurred was not protected. *Id.* at 28-29.

At the hearing, the Complainant alluded to the Code of Federal Regulations as the source for his concern for the plant (Tr. 477) However, he was unable to reference any specific action by the Respondent that he found in violation of any regulation. (*Id.*) He did express concern over the fact that the plant entrances and gateways were no longer going to be armed. (Tr. 478)

The evidence in this case leads me to the conclusion that the Complainant did not assert any complaint grounded in conditions constituting reasonably perceived violations of the environmental acts. The Complainant was, at no point, able to reference any act or regulation which he felt would be violated by the restructuring plan. His vague reference to the Code of Federal Regulations at the hearing, with prompting from counsel, was an obvious attempt to legitimize his concerns after the fact. (Tr.477) Absolutely no evidence has been presented that would indicate the Complainant knew of the existence of the Energy Reorganization Act let alone that he believed that the Respondent was violating it. In fact, the content of the Complainant's concerns indicates that this is a situation where he subjectively thought the complained of employer conduct might affect the

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environment. As discussed above, such concerns do not arise to the level of protected activity and are, thus, not actionable. *Crosby*, *supra*.

Complainant's testimony at the hearing makes it clear that he was voicing subjective environmental concerns with no regard to any act or regulation. Complainant, at the meeting announcing the restructuring plan, objected with the following:

> Well, let's not forget that this is a nuclear facility. You know, it's not like an airport or anything like that. If anything did happen, it would be catastrophic to the surrounding communities, such as like Three-Mile Island, something like that, or Chernoble (sic).

(Tr. 141) When asked if he debated the issue, the Complainant responded:

> No, really, I just not really. I just expressed my concern about, you know, that this is a nuclear facility, there are a lot of people that live in the surrounding area, which one is my wife and kids, and I want that facility secure not only for me, but for them as well.

(Tr. 143) The Complainant's subjective environmental concerns are further revealed in the following exchange at the hearing:

> Q. Did you ever express a concern to Stanley Smith management about the possibility of an intruder breaching the perimeter without armed guards there?
> A. No, I don't I don't think I did. I think I just basically told them that, you know, we're kind of forgetting that this is a nuclear facility.

(Tr. 153-4) In another exchange, when asked about his concerns regarding the reorganization plan, the Complainant answered, "[f]or the safety of the employees, safe protection of the plant and the officers protecting the plant, and the surrounding communities." (Tr. 227) On recall, the Complainant was again asked the basis for his

objections. The Complainant responded, "[t]hat it would jeopardize the security of the plant." (Tr. 477) It was this concern that the Complainant attempted to ground in his knowledge of the Code of Federal Regulations. (Tr. 478)

Based on my review of the evidence, I find that the Complainant's concerns were in no way grounded in conditions constituting reasonably perceived violations of the environmental acts. As such, they cannot form the basis for protected activity. Counsel for Complainant submits that ill-informed complaints should be protected as well if they are misguided or insufficiently informed regarding their concern. (Complainant's Brief In Support Of Answer To Respondent's Motion To Strike Portions Of Complainant's Brief, p. 4) In support of this proposition, counsel has directed the court's attention to *Passaic Valley Sewerage Commissioners v. United States Dept. of Labor*, 992 F.2d 474 (3rd Cir. 1993). A review of this case, however, reveals it

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to be clearly distinguishable from the case *sub judice*. In *Passaic*, the complainant was misinformed regarding the application of specific provisions of the Clean Water Act. *Id.* at 476. Despite this confusion on behalf of the complainant, the protected complaints were premised upon a particular environmental statute. However, in the case of Mr. Phillips, I have found that his complaints were not grounded in any environmental statute or regulation whatsoever. As such, I cannot find the expression of his concerns to his supervisors constitutes protected activity.

Respondent awareness of protected activity when adverse action was taken:

Assuming, *arguendo*, that the Complainant was engaged in protected activity, he still must establish that Respondent was aware of this activity when the decision to terminate him was made. *Floyd v. Arizona Public Service Co.*, 90-ERA-39 (Sec'y Sept. 23, 1994). This awareness can be proven by either direct or circumstantial evidence. *Samodurov v. General Physics Corp.*, 89-ERA-20, slip op. at 11 (Sec'y Nov. 16, 1993). The Complainant has failed to produce the necessary evidence to satisfy this burden as well.

According to Mr. Hemerling, the decision to terminate the Complainant was made by Randy Dorn, the Executive Vice-President of Respondent for this region. (Tr. 387-8) Mr. Dorn was informed of the relevant events through the investigations of both Mr. Hemerling and Mr. Wilds. Mr. Wilds submitted a report concerning the results of these investigations, along with the appropriate documentation, to Mr. Dorn. (Resp. Ex. 19) Based on this testimony and evidence, I find that the decision to terminate the Complainant was made by Mr. Dorn with significant participation by Mr. Hemerling and Mr. Wilds.[3]

Therefore, in order for the Complainant to satisfy his evidentiary burden on this issue, the evidence must show that these three individuals knew of the Complainant's protected activities prior to making the decision to terminate him. Mr. Hemerling and Mr. Wilds

both testified at the hearing that they never heard the Complainant register any safety complaints at the restructuring meeting on April 7. (Tr. 250, 386) Both men did testify that the Complainant took issue with the requirements for the new TRO position, specifically the attendance points needed to qualify. (Tr. 252, 376) They also testified that they received no safety complaints from the Complainant subsequent to this meeting nor were they made aware of any such complaints by any other person. (Tr. 250, 386) Both men also testified that their decisions to terminate the Complainant were based upon his disclosure of information to unauthorized persons and had nothing to do with complaints about the restructuring plan. (Tr. 276, 386) I find that the testimony of both Mr. Hemerling and Mr. Wilds to be credible. Therefore, I find that neither Mr. Hemerling nor Mr. Wilds knew of the Complainant's safety concerns when the decision to terminate him was made.

There is also no evidence in the record to indicate that Mr. Dorn was aware of any safety complaints by the Complainant at the time he decided to terminate the Complainant.

The fact that Mr. Dorn is located at Respondent's office in Naperville, Illinois makes it unlikely that he would have first-hand knowledge of any such complaints. (Tr. 358) Such knowledge would have to come from the plant through Mr. Wilds or Mr. Hemerling, who have already established that they were not aware of any such complaints. The Complainant testified that Mr. Dorn was present at the restructuring meeting of April 7. (Tr. 140) However, no evidence has been offered to even raise an inference that he was aware of any safety concerns raised by the Complainant. Consequently, I find that the evidence fails to establish that Mr. Dorn was aware of any protected activity by the Complainant when he made the termination decision.

The Complainant also testified to complaining to a number of captains and lieutenants regarding the restructuring plan. However, there is no evidence to indicate that these officers shared this information with those individuals who made the decision to terminate the Complainant nor that they were in any way involved with the disciplining process. This specifically includes Lieutenant McKamy.

Therefore, I find that the Complainant has failed to establish that the individuals who were responsible for the adverse action had any knowledge of the Complainant's protected activities.

Conclusion:

Based on the foregoing, I find that the Complainant has failed to establish that he engaged in protected activity. As this is a *prima facie* element of any whistleblower claim, the complaint must be dismissed.

RECOMMENDED ORDER

It is hereby RECOMMENDED that the complaint of Robert Phillips be DISMISSED.

DANIEL J. ROKETENETZ
Administrative Law Judge